MR. BECKER: Yes, your Honor.

THE COURT: (continuing) —is, shall I say, very palpable, and I am sure that you know just what I mean. [Tr. 4]

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THE COURT: . . . I see no reason why I should grant this application for leave to withdraw the plea in the light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable. [Tr. 5]

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THE COURT: The test is: Was this plea voluntarily made? In answer to that question, because of your statement to the Court at the time that the plea was entered, or just immediately prior to it, and because of what transpired at the sidebar conference, following that I made sure that I got a specific answer to the questions which are generally asked of the defendants who enter pleas of guilty to informations or indictments. [Tr. 5-6]

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THE COURT: Mr. Williams, do you want to address yourself to this?

MR. WILLIAMS [Assistant U. S. Attorney]: Yes, your Honor I do. At the time your Honor accepted the plea of guilty from these three individuals, there was a searching inquiry by the Court as to their specific desires. I believe the record must show that your Honor was satisfied that the men knew what they were doing at the time of the entry of the plea: The record is clear as to that. Your Honor, I don't think that the interests of justice would be served at this point, by allowing them to withdraw the plea.

MR. BECKER: How is the interest of justice injured by the withdrawal of the plea?—I am just answering Mr. Williams.

THE COURT: I must repeat, I must repeat this: I think their reasons for this application are palpable. Now, I have said that three times, and I am sure you understand just what I mean. I am going to deny your application.

MR. BECKER: Would your Honor let me say that your Honor has a great advantage of me, you talked about "palpable", and those are concerning things which are not within my knowledge, and I say that as an officer of this Court.

THE COURT: I am not charging you, I am not charging you, not at all. I am not charging you. [Tr. 9-10]

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MR. BECKER: Your Honor, may I say this: From your Honor's statement off the bench, you know a lot more than I as to what is going on.

THE COURT: I think I do.

MR. BECKER: I am a little perturbed to be operating in darkness, so to speak, very frankly.

THE COURT: I don't think you are operating in the dark, particularly, but I believe I do have more information than you have with respect to certain phases of this matter, considerably [sic] than you with respect to the proceedings which have been had in the bankruptcy Court here, but I am not confining it to that. [Tr. 12]

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THE COURT: I am constrained to adhere to what I indicated my decision would be.

MR. BECKER: No one has been prejudiced, your Honor.

THE COURT: I must decline to grant your application.

MR. BECKER: No one has been prejudiced. No one has been prejudiced.

THE COURT: I know that, I know that, but you probably don't know all the reasons which I have for taking this course.

MR. BECKER: Well, I say that I may be operating in a great area of darkness.

THE COURT: Perhaps it is just as well, insofar as those matters are concerned, that you continue to operate in that area of darkness. [Tr. 20-21]

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THE COURT: Absent a good sound reason for the granting of an application of this kind, I am compelled to deny it because of the fact that these are intelligent men who were well represented by experienced and capable counsel, who knew exactly what they were doing, who in answer to questions asked them, stated that the act was their voluntary act, and that they were made no promises and no threats, in order to induce them to enter a plea. Now, those positive answers to those questions is to me proof positive that they knew what they were doing all the time. There is no reason why I should— [Tr. 21-22]

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MR. BECKER: Let me say this your Honor. If the Circuit Court of Appeals reverses [the bankruptcy adjudication], then these men who have pleaded guilty, will have pleaded guilty to a crime which was never committed.

THE COURT: If such a thing should happen, then you have a remedy for that.

MR. BECKER: You have 60 days in which to ask for relief.

THE COURT: That is right.

MR. WILLIAMS: That is correct, and at any time there is 2255.

THE COURT: Yes, 2255, under any circumstances, there is no question about that. [Tr. 25-26]

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THE COURT: . . . I think you have not laid what I regard as an adequate and proper basis for the granting of leave to withdraw their pleas of guilty, and to enter pleas of not guilty. That is the reason why I deny the application. [Tr. 34]

On appeal, the Court of Appeals affirmed the action of the District Court, stating that the petitioners had made no attempt to deny that they had made their pleas of guilty knowingly and voluntarily and with full knowledge of the possible consequences. The conclu-

sion was that no abuse of discretion had been shown on the part of the District Court.[3] But no mention was made by the Court of Appeals of the considerations growing out of the foregoing remarks of the District Court regarding the "palpable" nature of the application and the superior and unrevealed knowledge of the judge which apparently influenced his action, despite the fact that these considerations were brought to the attention of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is inconsistent with the pertinent decisions of this Court and of the Court of Appeals for the District of Columbia Circuit.

The Court of Appeals below, like the District Court, held that a motion to withdraw a plea of guilty, filed before sentence pursuant to Rule 32(d), Fed. Rules Crim. Proc., is to be judged by the narrow standard of whether the petitioners "entered their pleas knowingly and voluntarily, and with full knowledge of the possible consequences." If they did so enter their pleas—as was found here—the motion was held to have been properly denied.

In so holding, however, the court below applied a standard that falls short of the principles set forth by this Court in *Kercheval v. United States*, 274 U.S. 220, 224, for testing motions to vacate pleas of guilty. There the Court stated that a guilty plea will be vacated not only if it is shown "to have been unfairly obtained or given through ignorance, fear or inadvertence" but also where it appears "for any reason" that the granting

[3] The Court of Appeals further stated, without indicating the significance under Rule 32(d), that on the appeal counsel "does not offer any direct affidavits from them, but advances only his own assertions and hearsay belief in his clients."

of the privilege of substituting a plea of not guilty "seems fair and just." Obviously the substitution of a not guilty plea may be fair and just even where it cannot be shown that the original plea of guilty was entered involuntarily or unintentionally or without full knowledge of possible consequences. New factors—such as a significant change in the law or in availability of evidence—may make the substitution fair and just however voluntary and intelligent the original plea may have been.

Rule 32(d), in relation to motions to vacate filed prior to sentencing, would seem to embody the *Kercheval* principles. It provides that "A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended; . . ." Since the motion in this case was made before rather than after imposition of sentence, the second portion of Rule 32(d), permitting withdrawal after sentence only "to correct manifest injustice", does not come into operation.[4]

A motion made before imposition of sentence, of course, is addressed to the sound discretion of the District Court. But in exercising that discretion, the court would appear bound to apply the principles of the *Kercheval* case and look beyond the mere voluntariness of the original plea. In other words, any reason which would make the withdrawal and the substitution "fair and just" should also be considered. And it is that more liberal approach to these motions that has been adopted by the Court of Appeals for the District of

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[4] "When, however, as here, the motion to withdraw the plea is made before sentence is imposed, this court has interpreted the first clause of Rule 32(d) to set a more lenient standard." *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.).

Columbia Circuit. As stated in *Poole* v. *United States*, 250 F. 2d 396, 400 (App. D.C.), "Leave to withdraw a guilty plea prior to sentencing should be freely allowed." Again, in *McJordan* v. *Huff*, 133 F. 2d 408, 409 (App. D.C.), that court said that "it goes without saying that a plea of guilty at that time [arraignment] can be and often is changed, on proper motion, as a matter of course." And see *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.).

Had the District Court in this case sought to determine whether there were "fair and just" reasons for allowing a change in the pleas, rather than just inquiring into the voluntariness of the original pleas, such reasons have been found. While petitioners acted voluntarily and with knowledge of the consequences in pleading guilty, they also acted under the great strain of the prolonged bankruptcy proceedings, which had desensitized them to the full legal and practical import of the indictment. Rejecting the advice of their own counsel, they were unable to grasp the strategic value of the pending litigation over the bankruptcy adjudication and the possible impact that litigation might have on the outcome of the criminal proceedings.[5] And the Government countered with no reason whatever why the withdrawal of the pleas would be unjust or unfair; the prosecutor contented himself with the remark that the pleas had been voluntary and

[5] While a reversal of the bankruptcy adjudication could not affect the validity of the indictment, such a reversal might well alter the prosecution's determination to go ahead with the criminal trial or affect the sentence imposed after trial and conviction. Both the trial judge and the prosecutor showed an awareness of these possibilities in their references to the availability of a motion to correct an illegal sentence under Rule 35 and of a motion under 28 U.S.C. § 2255. Tr. 25-26.

that "I don't think that the interests of justice would be served at this point, by allowing them to withdraw the plea." Tr. 10. No showing was made that the Government would in any way be prejudiced by the change in pleas, that its witnesses were no longer available, or that preparations for trial would in any way be hampered.

Thus it becomes appropriate for this Court to resolve the conflict between the standard applied by the court below in testing the motion to change the pleas and the standard set forth in the *Kercheval* case and applied to Rule 32(d) motions by the Court of Appeals for the District of Columbia Circuit. That appropriateness is underscored by the absence of a definitive ruling by this Court as to the proper standard to be applied to motions filed under Rule 32(d) prior to sentencing.

2. The decision below raises an important question as to the reviewability of a District Court's exercise of discretion in denying, for certain unstated reasons, a motion to withdraw guilty pleas.

It is axiomatic, of course, that a motion to withdraw a plea of guilty and to substitute a plea of not guilty is addressed primarily to the discretion of the trial court. There is no absolute right to change the plea. And the court's action within the realm of its lawful discretion is not subject to review. Only an abuse of that discretion warrants any appellate inquiry. The Court of Appeals here recognized those basic principles and purported to apply them, concluding that "We do not think this case shows any abuse of discretion."

Apart from and in addition to the issue as to whether the courts below applied the proper legal standard in testing the effort to change petitioners' pleas is a most

serious question whether the District Court abused its discretion in such a way as to make it impossible for the Court of Appeals intelligently to perform its limited function. Time and again, as the transcript shows, the District Court alluded to the "palpable" nature of the application—without ever defining what was meant by "palpable"—and to certain mysterious events that apparently transpired outside the record of this case and subsequent to the original pleas herein. These events and their significance and pertinence were not revealed by the court and remain unknown to this day to the petitioners, their counsel and the Court of Appeals.

The District Judge emphasized repeatedly that he was motivated to deny the application not solely on the basis of the considerations put forth on petitioners' behalf but also on the basis of certain information which he alone had and as to which the petitioners' counsel was in the dark. He could see "no reason" to grant the application "in light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable." Tr. 5. And when petitioners' counsel objected to being kept in the dark about such matters, the court responded that "Perhaps it is just as well, insofar as those matters are concerned, that you continue to operate in that area of darkness." Tr. 21.

As the Court of Appeals for the District of Columbia Circuit has well said, the discretion which is properly exercisable by a trial court under the first clause of Rule 32(d) "must be exercised on the basis of sound information, soundly viewed." *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.). The exercise of judicial discretion in any area, this Court has said,

"implies conscientious judgment, not arbitrary action." *Burns* v. *United States*, 287 U.S. 216, 222-223. Discretion, in other words, "should not be a word for arbitrary will or inconsiderate action," *The Styria* v. *Morgan*, 186 U.S. 1, 9, but must be "directed by the reason and conscience of the judge to a just result." *Langnes* v. *Green*, 282 U.S. 531, 541.

Thus it is not enough to say that a matter is within the trial court's discretion and unreviewable save for an abuse of discretion. To determine if there has been an abuse, the matters motivating the exercise of discretion must be made apparent. Otherwise the reviewing body cannot intelligently determine if an abuse has in fact occurred. See *Ex parte Farmers' Loan & Trust Co.*, 129 U.S. 206, 215. But if the factors which in whole or in part motivate the court to deny leave to withdraw a guilty plea are kept secret, how can the applicant hope to meet his burden of demonstrating "fair and just" reasons for allowing the change in pleas? How can he demonstrate the possible inaccuracy or lack of pertinence of the secret factors? And how can an appellate court be sure that the trial court's discretion has not been abused? In this area of criminal guilt, where a man's liberty hangs in the balance, appellate courts have a special responsibility for determining that such discretionary power is not abused. Cf. *Green* v. *United States*, 356 U.S. 165, 188. Yet such secret motivations as were exhibited by the District Court in this case make it impossible for the Court of Appeals or even this Court to meet that responsibility.

In other words, the exercise of discretion by the District Court can be approved or disapproved only in light of the factors and motivations revealed by the court. If secret considerations known only to the court

are *per se* improper, then the action here cannot stand.[6] See *Service* v. *Dulles*, 354 U.S. 363, 372. At the very least, the court's reliance on these unknown factors makes it impossible for an appellate court to know what the trial court's action means and hence whether it is right or wrong.[7] Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194; *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654. In such circumstances, petitioners are entitled to a re-evaluation of the motion by the District Court so that the basis of its action may become clear and any abuse of its discretion corrected.

These are matters, moreover, which go to the basic fairness of the hearing on a motion to withdraw a plea of guilty before sentence. Are the applicants entitled to know all the considerations involved in passing upon their applications? Cf. *Mattox* v. *United States*, 156 U.S. 237, 242-244; *Kirby* v. *United States*, 174 U.S. 47; *Motes* v. *United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273. Is it proper to apply Rule 32(d) in such a way as to disregard the "fair and just" reasons submitted in support of the application and to deny

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[6] This problem is not avoided by the fact that the District Court, rather inconsistently, at times stated that it was not confining its ruling to these secret considerations (Tr. 12) and that petitioners had not laid an adequate basis for changing their pleas (Tr. 34). The fact is that the court was substantially motivated by these secret factors. See Tr. 20-21.

[7] Cf. Rule 52(a), Fed. Rules Civil Proc., as to which it has been held that a trial court's findings of fact should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which the trial court reached its decision. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 422; *Irish* v. *United States*, 225 F. 2d 3, 8 (C.A. 9).

withdrawal of a plea on considerations which are conceded to be within the "area of darkness"?

An important and hitherto unresolved question is thus raised as to the administration of Rule 32(d) in the federal courts and as to the reviewability of denials of motions to withdraw guilty pleas.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reviewed upon the grant of this petition for a writ of certiorari.

Respectfully submitted,

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